Oil, Chemical and Atomic Workers International Union, Local 3-495, AFL–CIO (Hercules, Inc.) *and* Benjamin Spangler. Case 11–CB–2225

July 15, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

On June 29, 1993, Administrative Law Judge William N. Cates issued the attached decision. The Respondent Union filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.[2]

We agree with the judge that statements made by Union Steward Doyle violated Section 8(b)(1)(A) of the Act because they conveyed a policy of preferential treatment for union members. In addition, we agree with the judge that the General Counsel demonstrated that Doyle, as a union agent, acted unlawfully in failing to file grievances for Spangler, Hill, Fritz, and Anderson. We reverse, however, the judge's finding that Doyle's statements and his failure to file the grievances at issue support the conclusion that the Respondent established and maintained an overall policy of unequal representation of nonmembers.

1. The Respondent has excepted to the judge's finding that it violated the Act by failing to file grievances on behalf of Fritz and Anderson. Fritz and Anderson were on Doyle's original crew. The Respondent contends that there is no evidence that Fritz and Anderson were treated disparately because, according to the Respondent, Doyle did not file grievances on behalf of any employee on his original crew—including union members. We find no merit in the Respondent's exception. The judge credited Fritz' and Anderson's testimony that Doyle stated that he was filing grievances only on behalf of union members. Doyle's statement establishes a prima facie case of discriminatory treatment under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Pursuant to *Wright Line*, the burden then shifts to the Respondent to rebut the General Counsel's prima facie case. Although the Respondent asserts that no grievances were filed on behalf of Doyle's original crew, the Respondent did not proffer any evidence to support this assertion; indeed, the record does not even reflect which employees were on Doyle's original crew. In addition, and contrary to the Respondent's further assertion that Doyle did not believe that anyone on his original crew was affected by the Company's change in work hours, the General Counsel's Exhibit 5 shows that Doyle himself signed a grievance filed on February 18, 1992, prior to being assigned to represent former Union Steward Bradley's crew. Finally, we note that after Doyle was assigned to Bradley's former crew, Fritz and Anderson *were* similarly situated to Spangler and Hill because the record shows that Doyle continued to represent his original crew. In these circumstances, the Respondent's bare assertions are not sufficient to rebut the General Counsel's prima facie case. Accordingly, we agree with the judge that the Respondent violated Section 8(b)(1)(A) of the Act by failing to file grievances on behalf of Fritz and Anderson.

2. We do, however, find merit in the Respondent's exception to the judge's finding that the Respondent established and maintained a policy that nonmembers would not be equally treated. The judge found that the General Counsel made out a prima facie case that the Respondent had established and maintained such a policy based on Doyle's unlawful statements and the fact that Doyle solicited grievances only from union members. The judge found that the Respondent failed to rebut the General Counsel's prima facie case. We disagree.

The record reflects that the Respondent has represented nonmembers, including nonmembers who were affected by the Company's change in starting times. In addition, we note that the record does not show that any of the other approximately 30 union stewards in the maintenance department refused to file grievances on behalf of nonmembers or that the Respondent actually failed to represent any other nonmembers. Nor are there other claims that nonmembers have been unequally represented. For these reasons, we find that the record does not support the judge's finding that the Respondent established and maintained a policy of refusing to represent

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

[2] In the remedy section of his decision, the judge recommended that backpay be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Because any backpay that may be due employees Spangler, Hill, Fritz, and Anderson results from the Respondent's unlawful failure to file work-schedule change grievances on their behalf and does not involve cessation of employment status or interim earnings, use of the *Woolworth* formula is unwarranted. The appropriate formula to be applied is the one set forth in *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). The remedy is so modified.

nonmembers or of representing nonmembers and members unequally. See *Letter Carriers Local 223 (Postal Service)*, 311 NLRB 541 (1993). Accordingly, we shall dismiss this portion of the complaint.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Oil, Chemical and Atomic Workers International Union, Local 3-495, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(c) and reletter the subsequent paragraph.

2. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected activities.

WE WILL NOT communicate a policy to employees that we will give preferential treatment to union members.

WE WILL NOT fail to file any grievance for any employee because the employee is not a member of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Benjamin Spangler, Michael Hill, Gerald Fritz, and James Anderson whole for any loss of compensation they may have suffered as a result of our failure to file work-schedule change grievances on their behalf commencing in May 1992.

OIL, CHEMICAL, AND ATOMIC WORKERS INTERNATIONAL UNION, LOCAL 3-495, AFL–CIO

Donald R. Gattalaro, Esq., for the General Counsel.
Gregory Mooney, Esq., of Lakewood, Colorado, for the Company.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. There are two overall issues presented in this case. The first is whether Oil, Chemical and Atomic Workers International Union Local 3-495 (Union) Shop Steward Philip Doyle communicated to certain Hercules, Inc. (Company) employees during May 1992[1], that the Union would give preferential treatment to union members and whether the Union, through Doyle, established and maintained a policy that nonunion members would not be equally represented by the Union. The second overall issue relates to whether the Union failed, in May and thereafter, to file grievances for Benjamin Spangler (Spangler), Michael Hill (Hill), Gerald Fritz (Fritz), and James Anderson (Anderson)[2] because they were not members of the Union.

The Union denies having violated the Act in any manner.

Trial of this case was conducted before me in Blacksburg, Virginia, on April 20, 1993, based on Spangler's charge[3] and the complaint and notice of hearing (complaint)[4] issued by the Regional Director for Region 11 of the National Labor Relations Board (Board). Counsel for the General Counsel (Government) and Union filed briefs which have been carefully considered.

On the basis of the entire record, and my observation of the demeanor of the seven witnesses who testified, I will, as hereinafter more fully explained, conclude the Union violated the Act essentially as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION

The Company is a Delaware corporation with a facility located at Radford, Virginia, where it is engaged in the manufacture of ammunition and propellants. During the 12 months preceding issuance of the complaint herein, a representative period, the Company received at its Radford, Virginia, facility goods and materials valued in excess of $50,000 directly from points outside the State of Virginia. During the same representative period, the Company manufactured, sold, and shipped from its Radford, Virginia facility products valued in

[1] All dates are 1992 unless I specify otherwise.

[2] It was originally charged that the Union also failed to file grievances for James Elliot and Sam Carpenter; however, counsel for the General Counsel's unopposed motion at trial to delete those individuals from the complaint was granted.

[3] Spangler's charge was filed on November 16, and amended on December 28.

[4] The complaint issued on December 29.

excess of $50,000 directly to points outside the State of Virginia. The complaint alleges, the parties admit, the evidence establishes, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (Act).

II. THE LABOR ORGANIZATION

The complaint alleges, the parties admit, the evidence establishes, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

The Union was designated as the exclusive collective-bargaining representative of certain (production and maintenance) employees of the Company and has, at least since 1955, been so recognized by the Company. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms from October 7, 1989, until October 7, 1993. The parties' collective-bargaining agreement at article V sets forth a multistep ''Grievance Procedure'' that culminates, if necessary, in final and binding arbitration. The collective-bargaining agreement reflects 8 hours shall constitute a workday and 40 hours a workweek. Time worked in excess of 8 hours in any workday or 40 hours in any workweek is considered overtime.

For an extended time prior to late January, the Company's maintenance employees worked an 8 a.m. until 4:30 p.m. work shift. At times prior to January, the maintenance employees reported to their respective shop areas at 8 a.m. where they were then given their daily work assignments. Those maintenance employees that drew assignments away from the shop's areas were transported by company-provided vehicles to their work locations. The maintenance employees would work their assignments until 4:15 p.m. at which time they would be transported by company-provided vehicles back to the maintenance shop's areas in time to clean up and complete the workday by 4:30 p.m. Prior to late January, any maintenance employee given a work assignment prior to 8 a.m. was paid overtime at 1-1/2 times premium pay in 15-minute increments. Prior to late January, no maintenance employee was considered tardy or docked pay until after 8 a.m.

In late January, the Company unilaterally commenced requiring all maintenance employees to be at their maintenance shop areas in time to receive their work assignments and to physically be in company-provided vehicles ready for travel to their jobsite locations not later than 7:45 a.m. without premium or overtime pay for any time prior to 8 a.m. Maintenance employees that did not report by 7:45 a.m. were considered tardy and penalized in accordance with the Company's absenteeism policy.

On July 1, the Union filed an unfair labor practice charge against the Company (Case 11–CA–15057) in which it was contended the Company, by unilaterally changing the negotiated hours of work for certain of its maintenance employees, had violated the Act.[5] After an investigation, Region 11 of the Board, on behalf of the General Counsel of the Board, issued a complaint (Case 11–CA–15057) charging the Company with violating the Act by unilaterally changing the work hours of certain of its maintenance employees. In mid-August, the Union advised the Regional Director for Region 11 of the Board that it had ''reached an agreement'' with the Company which ''satisfactorily'' addressed and resolved all issues related to the complaint in Case 11–CA–15057 and requested to withdraw the charge in that case. The settlement the parties arrived at follows:

> In the interest of harmonious industrial relations, the Company and Union agree to the following:
>
> 1. Maintenance Employees shall report to their respective shops at the start of their regularly scheduled shifts (revert back to the practice in effect prior to January 27, 1992).
>
> In acceptance of this agreement, the Union agrees to withdraw NLRB Case No. 11–CA–15057.
>
> 2. Maintenance Employees who are not assigned to the shop area shall report to their respective shops prior to the end of their regularly scheduled shifts. Those employees that are deemed by the Company to have paid shower time may be in the shop no earlier than one-half hour prior to the end of the shift. Those employees that do not receive paid shower time may be in the shop no earlier than fifteen minutes prior to the end of the shift. For example, an E shift Carpenter (CARA) that is determined to have paid shower time would report to the shop at 8:00 a.m. start of shift, and again at 4:00 p.m., prior to the end of the shift. An E shift Carpenter that does not receive paid shower time would report to the shop at 8:00 a.m. start of shift and again at 4:15 p.m., prior to the end of the shift.
>
> 3. Grievances filed on reporting to work early and clean up and travel time will be settled by paying the aggrieved employee(s) straight time pay for the time in question.
>
> It is the intent of the Company to abide by the provisions of the Labor-Management Agreement.

Date	Date
/s/ Kenneth Thompson	/s/ Charles R. Lee
President	Director Human Resources
O.C.A.W., Local 3-495	Hercules Incorporated-RAAP

Local Union President Kenneth Thompson (President Thompson) estimated approximately 192 different individuals filed grievances in connection with the above overtime dispute. He estimated there are 600 to 700 employees at the Company.[6] President Thompson testified, without contradiction, that there is no provision for class action type grievances under the contractual grievance procedure. President Thompson explained that any employee affected or potentially affected by the overtime dispute (or any other dispute) had to file or sign a grievance in order to have the matter addressed. Thompson further explained that if a grievance was intended to cover more than one employee, each employee seeking to be covered by the grievance had to sign an attachment to the grievance. President Thompson also testified, without contradiction, that under the grievance procedure there is no provision for a continuing grievance. He ex-

[5] In a letter accompanying the charge, the Union requested its charge not be *Collyer*ized.

[6] Not all maintenance department employees were adversely affected. For example, the employees that worked exclusively in the shop areas were not impacted under the unilateral changes.

plained that in the situation where a grievance is a continuing one, a new grievance had to be filed every 15 days, otherwise, it would be understood it was not continuing.

A review of the mechanics of filing a grievance pursuant to the instant collective-bargaining agreement to include who may file and how a grievance is thereafter processed is helpful at this point.

Any grieved employee may discuss the same with his/her immediate salaried supervisor with or without union representation. If an employee having a grievance is not satisfied with management's step 1 response, the employee may obtain a grievance form from any salaried supervisor and reduce the grievance to writing. The Union is required to participate at step 2 of the grievance procedure even though the individual filing the grievance may also continue to participate.[7]

President Thompson testified that all union stewards are instructed to treat union and nonunion employees alike and if a nonunion employee wished to file a grievance, the stewards ''are to file that grievance.'' President Thompson said that while an employee can initiate his/her own written grievance, that procedure is not ''normally'' followed. President Thompson acknowledged, with respect to the grievances at issue herein, that ''no individual employee'' filed any such grievance but rather all were filed by the Union.

Spangler testified that at the time the Company initiated the unilateral change in working hours the union steward for his assigned crew was David Bradley. Spangler testified that shortly after the change Bradley announced to his assigned work crew that anyone interested in signing a paper (grievance) on the work schedule changes should meet with him in the shop. Spangler said he and several other maintenance employees signed the grievance Bradley had prepared. The first such grievance that Union Steward Bradley sought to have interested employees sign was initiated on or about February 5, followed by additional grievances on February 18, March 9, and April 9. Spangler testified union steward Bradley ''always encouraged us to sign'' the grievances saying ''it would help his cause.''

According to Spangler, Bradley left the Company in ''early summer.'' After Bradley left, Philip Doyle was assigned as Spangler's work crew's union steward. Spangler stated his first encounter with Union Steward Doyle took place shortly after Bradley departed the Company.

Spangler testified Doyle spoke to the work crew about the overtime related grievances. According to Spangler, Doyle brought a ''notebook'' with him and as the work crew was loading a company-provided vehicle for transportation to their assigned jobsites Doyle told the employees, as he handed the notebook to one of them already on the truck, that ''he had these grievances or papers . . . fixed up in neat order.'' Spangler observed the papers had been ''typewritten'' and stated one employee asked Doyle what happened if your name was not in the book. According to Spangler, Doyle replied, ''if your name's not in there, you can't sign it.''[8] Spangler testified that as Union Steward Doyle left the area he (Doyle) stated:

> [H]e was going to do this thing different than what [Union Steward] Bradley had done before, that he wasn't going to let any free riders sign these papers or non-union members.

Spangler explained that Union Steward Doyle solicited certain employees, identified as being union members, to sign the grievance papers. Spangler testified:

> [Union Steward Doyle] would bring the notebook and tell them to put down how many hours they had worked in that particular period of time, that they were due for overtime the 15 minutes before or after and they would write down how many hours they had accumulated during that 10 to 15 days or whatever the time lapse had been.

Spangler testified that when the maintenance employees were paid as a result of the settlement of the overtime dispute, he did not receive the amount he felt he was entitled to. Spangler complained to President Thompson who told him if he had not signed the grievances, he would not be paid. Spangler told President Thompson he ''didn't get a chance to sign these grievances.''

Anderson testified that in 1992, his assigned union steward was Doyle.[9] Anderson stated that after the Company changed the maintenance employees' work hours, union steward Doyle brought a black book or binder with him one morning ''approximately in the winter or around the first of spring'' and told the work crew members they ''couldn't sign this book'' unless they were ''a union member.'' Anderson, though uncertain, thought Spangler and Fritz were among those present at the time. Anderson said he observed Union Steward Doyle on approximately three separate occasions thereafter talking with groups of union members that he had pulled aside. Anderson said that on each occasion, Doyle opened his notebook as he talked with them.

Former company electrician Fritz[10] testified that although Doyle was his assigned union steward, he never asked him if he could sign any grievance related to the overtime situation but added he overheard Doyle talking with employees about the overtime grievances. Fritz said the conversation he overheard took place in March or April as his work crew was on a truck waiting to be transported to their work sites for the day. Fritz remembered Anderson and at least one other employee being present. Fritz said an employee signed the grievance sheet[11] and asked Doyle about other employees signing it. According to Fritz, Doyle responded ''it was for paying members only'' and made reference to ''non-union members not being able to sign it.''

Employee Hill[12] testified that when the Company unilaterally changed the work schedules in January, his union steward, Bradley, prepared and encouraged him to sign griev-

[7] President Thompson testified that step 2 of the grievance procedure commences when a grievance is reduced to writing.

[8] Spangler said his name was not in the book so he assumed he could not sign it.

[9] Anderson testified he is not a member of the Union herein but rather belongs to IBEW, Local 637 (Roanoke, Virginia).

[10] Fritz said he is not a member of the Union herein but rather is a member of an IBEW local.

[11] Fritz said he was aware the paper in question was a grievance but was unaware of specifically what grievance.

[12] Hill stated he at one time had been a member of the Union but not recently.

ances related thereto.[13] Hill testified that on or after May 15, Doyle became his union steward. Hill said that around late May or early June, Doyle brought a ''black notebook'' with him to the work crew loading area and passed it around for employees to sign papers therein. According to Hill, employee Tom Custard asked what the ''book'' was about and Doyle told him it concerned the employees ''starting [work] early and quitting [work] late.'' Custard commented that not all the employees were on the list to which Doyle replied ''this is for paying members.'' Hill said Custard signed the paper and passed the book to another union member to sign.[14]

Union Steward Doyle testified that during his 6 years as a steward, he had always been told by various union officials to treat and represent union and nonunion members equally.

Doyle said he was transferred by company supervision to the crew that Union Steward Bradley had previously worked on. Doyle said that after replacing Bradley, he filed a series of grievances for the employees on that crew concerning the Company's unilaterally changing scheduled worktimes.[15] Doyle testified that in preparing the first of the grievances he filed, he obtained standard language prepared by Union President Thompson from fellow steward Michael Melvin. Doyle said that after obtaining a grievance form from his supervisor, he prepared a pretyped grievance on his home computer using the union-drafted standard language.[16] Concerning the names included on his first and subsequently submitted grievances, Doyle testified:

> I took a list of names of the people that I knew were affected, you know, that had either approached me[17] or that I directly knew were affected[18] by this change and I [typed the names] . . . on a sheet[19] and I took that sheet the very next day or . . . couple of days . . . [and] . . . passed it out on the truck in the morning to be signed by all the people that were affected . . .

Doyle testified that certain employees asked to be included on the grievances after he had typed them. He said he allowed such individuals to write their names onto the grievances.[20]

Doyle testified he passed the grievances around to be signed at each opportunity he had such as when the employees got together for safety meetings. Doyle testified employees Spangler, Hill, Fritz, and Anderson never at any time asked to be included in any of the grievances and he stated he never at any time told them they could not sign the various grievances. Doyle denied ever telling employees the Union would give preferential treatment to its members in connection with the overtime issue. Doyle likewise denied ever establishing or communicating a policy that nonunion members would not be equally represented by the Union.

IV. DISCUSSION, ANALYSIS, AND CONCLUSIONS

The key to decision in this case is to determine if Union Steward Doyle made certain comments attributed to him by the Government's witnesses. If it is concluded he made such comments, it is necessary to determine if such comments constitute violations of the Act as alleged in the complaint. Further, it is necessary to ascertain if Doyle's comments, even if unlawful, are time barred by the limitations period outlined in the Statute.

First, I credit Spangler's uncontradicted testimony that Union Steward Bradley actively solicited employees, including himself, to sign the grievances he prepared on the work schedule changes that give rise to the issues herein. It is undisputed that after Bradley left his employment with the Company, Union Steward Doyle assumed Bradley's union duties related to Spangler's work crew. It is likewise undisputed that when Doyle commenced to file grievances he pretyped the grievances including the names set forth thereon. Doyle only included union members' names on the first grievance he filed. It is clear Spangler's name was not among those pretyped on the grievances Doyle prepared. I specifically credit Spangler's testimony that when asked, Union Steward Doyle explained that if an employee's name did not appear on the grievances, that employee could not sign the grievances that he (Doyle) was going to do things differently than former Union Steward Bradley had done in that he (Doyle) wasn't going to tolerate any ''free riders'' or ''nonunion members.'' Fritz credibly testified that after Union Steward Doyle presented grievance forms to one employee for signature that the employee asked Doyle about other employees signing the papers to which Doyle responded ''it was for paying members only'' and ''nonunion members would not be able to do so.'' Hill credibly testified that when Union Steward Doyle brought his ''black notebook'' to the work crew and passed it around for signatures (concerning employees starting work early and quitting work late) that employee Custard asked Doyle about certain employees not being on the list and that Doyle responded the list was ''for paying members.'' I credit Anderson's testimony that Union Steward Doyle told the work crew that they ''couldn't sign this book'' containing the grievance forms unless they were ''union member[s].''

I credit Spangler's testimony that Union Steward Doyle specifically solicited certain union members to sign the grievance papers he had prepared. Anderson credibly testified that he observed Doyle on approximately three separate oc-

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[13] Hill said he signed all the grievances Bradley prepared on the work schedule changes.

[14] Hill stated Custard closed the ''book'' when he passed it by him (Hill).

[15] Grievances filed by Doyle dated June 2, 9, 16, 23, 30; July 17, 28; and August 4, were received in evidence.

[16] Doyle said he put the standard language into his computer so that each time he resubmitted a grievance he would already have correct language for the grievance.

[17] On cross-examination, Doyle acknowledged that certain employees listed on the grievances he prepared, namely, Alley, Altizer, Collins, Manuel, Shepeard, St. Clair, and Wright did not ask that he include their names thereon.

[18] Doyle acknowledged that Hill and Spangler worked on the same crew as he did, however, he denied he had as much reason to suspect they were affected as he did any of the others.

[19] Doyle speculated that some employee may have asked where he obtained the list of names he included on the first grievance and he speculated he may have stated the list came from the Union.

[20] Doyle testified he thereafter added the handwritten names to his computer-generated list. On rebuttal, Spangler testified, without contradiction, that Howorth, who had written in his name on one of the grievances, was a close friend of Union Steward Doyle and that he saw Doyle solicit Howorth to sign the grievances during safety meetings.

casions take groups of union members aside, open his notebook, and speak with them.

It is clear from the above-credited statements that the Union, through its agent and steward Doyle, communicated a policy to employees the union would give preferential treatment to its members. Such violates Section 8(b)(1)(A) of the Act, and I so find.

The above finding does not, however, dispose of the issue of whether the above demonstrates the Union established and maintained a policy that nonunion members would not be equally represented by the Union. I am persuaded it does. Not only did Union Steward Doyle tell employees that nonmembers could not sign the grievances he carried around in his notebook because the Union was precluding free riders and nonunion members, he actively sought to have union members sign the grievance forms. Spangler, for example, testified that Union Steward Doyle (with his notebook containing grievance forms) solicited those he identified as union members to sign the papers. Anderson testified that Doyle pulled union members aside on at least three separate occasions with his open ''notebook'' in hand and talked with the employees, albeit out of Anderson's range of hearing. By the above, the Government established a prima facie case that the Union, by Doyle's actions and comments established and maintained an unlawful policy against representing nonmembers equally. I find the Union has failed to adequately rebut the prima facie case by evidence that would demonstrate it represents nonmembers equally. It simply is not enough for the Union to state it has always had, and continues to have, a policy of nondiscrimination against nonmembers.

In light of the above, I conclude and find the Union has established and maintained, in violation of Section 8(b)(1)(A) of the Act, a policy against representing nonunion members equally.

The Union argues that even if it is concluded as I have, Union Steward Doyle made the statements attributed to him and that the statements would otherwise constitute violations of the Act, such are time barred by Section 10(b) of the Act.[21]

The Union argues, and correctly so, that for the Government to prevail on the timeliness issue, it (the Government) has the burden of establishing the alleged violations occurred within the time frame allowed by the Act. The Union argues, and again correctly so, that to be timely, the violations herein must have occurred on or after May 15.

Although the evidence is somewhat less than crystal clear, I am persuaded Counsel for the Government met his burden of establishing the violations fell within the permissible time frame to be validly pursued. Spangler, whose testimony I credit, placed the date of Union Steward Doyle's comments and actions as being in ''early summer.'' Hill placed the date as ''last part of May or early June.'' These two witnesses' testimony is supported by other record evidence.[22] The first grievance of record that Union Steward Doyle filed is dated June 2.[23] Based on the above, I am persuaded the issues herein are timely and not barred by Section 10(b) of the Act.

Did the Union fail to file grievances on behalf of Spangler, Hill, Fritz, and Anderson as alleged in the complaint because they were not members of the Union? If so, was the Union's failure based upon unfair, arbitrary, and invidious reasons and/or in breach of the fiduciary duty it owed to the employees it represents.

I am persuaded the Union's actions, as well as inactions, related to the four employees in question violated the Act as alleged in the complaint. First, it is clear the Union through Steward Bradley vigorously solicited employees to sign grievances related to the Company's unilateral change in work hours for the maintenance employees. There is no showing that Union Steward Bradley was acting outside the knowledge of, or without direction from, the Union in soliciting employees to sign the grievances. There is no showing that any stewards (other than Doyle) acted or conducted themselves in a manner inconsistent with the actions of Bradley. Thus, it appears in agreement with counsel for the Government that Bradley's actions established the standard against which the Union's subsequent actions must be viewed.[24] It is clear Union Steward Bradley acted pursuant to a plan designed and established by the Union when he solicited employees to join in the grievances[25] related to the unilateral changes in working hours.

It is clear Union Steward Doyle changed the Union's established practice, followed by Bradley. Doyle moved away from soliciting all employees to sign the grievances at issue herein. It is clear Doyle changed the Union's practice because he wanted to ''do this thing different[ly]'' and eliminate ''free riders'' and ''nonunion members'' from signing or benefitting from the changed working hours grievances. Doyle's assertion that he only pretyped on the grievances the names of employees he knew were affected by the changes or that had asked him to do so is not believable in light of

[21] Sec. 10(b) of the Act, in pertinent parts, states ''no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board.''

[22] I am persuaded Anderson's recall in placing the date as having been ''in the winter or around the first of springtime approximately'' was too uncertain to be relied upon. I likewise find unreliable Fritz' recall that the date was ''about March or April.''

[23] I reject the Union's argument that there is no showing that Doyle's June 2 grievance was the first one he filed. If an earlier grievance exists that Doyle filed, the Union, which would have access to any such grievance, failed to produce such at trial.

[24] That Bradley's actions set the standard against which the Union's actions must be viewed and evaluated is borne out by certain actions of Union Representative Jeffries. Jeffries, on behalf of the Union, filed what amounted to a class action unfair labor practice charge against the Company. Jeffries in his ''facts'' letter accompanying his charge against the Company in Case 11–CA–15057 spoke in terms of ''all maintenance employees'' being affected. Thereafter when the Company and Union reached a settlement agreement covering the unilateral changes set forth in Case 11–CA–15057, Jeffries wrote the Regional Director of Region 11 urging the director to accept the Union's withdrawal of the charge in Case 11–CA–15057 because of the parties' settlement agreement that ''satisfactorily'' addressed and resolved ''all'' pertinent portions of the unilateral change allegations. The settlement agreement reflects all grievances filed ''on reporting to work early and clean up and travel time will be settled by paying the aggrieved employee(s).'' Thus, it is clear that Jeffries believed when he represented to the Regional Director that all pertinent portions of the unfair labor practice allegations had been resolved by making all affected employees whole that the stewards had, as Bradley had done, solicited all affected employees to sign the changed work hour grievances.

[25] In making this conclusion, I am mindful of the fact that there are no provisions for class action grievances or continuing grievances between the parties in their collective-bargaining agreement.

certain other record evidence. For example, Doyle only pretyped union members' names on the grievances. Doyle admitted he could only say for sure that two individuals (Freeland and Johnson) whose names he pretyped on the grievances had asked him to do so. Doyle's claim he placed others on the list based on his ''general knowledge'' with ''nothing specific'' that they were affected does not explain how he could work alongside other employees in question and not conclude they also were affected. The distinguishing factor, it appears, is Doyle only solicited[26] and/or included[27] union members on the grievances.

From all the above, it is clear the Union, through its Steward Doyle, altered its established practice of soliciting all affected employees to sign the grievances in question and that the changed practice was for the unfair, arbitrary, and invidious reason of excluding nonunion members from filing or participating in the overtime grievances.[28]

CONCLUSIONS OF LAW

1. Hercules, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Oil, Chemical and Atomic Workers International Union Local 3-495 is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing, since on or about May 1992, to file grievances for employees Benjamin Spangler, Michael Hill, Gerald Fritz, and James Anderson because they were not members of the Union, the Union breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

4. By communicating a policy to employees that the Union would give preferential treatment to union members and by establishing and maintaining a policy that nonmembers would not be equally represented by the Union, the Union has restrained and coerced employees in the exercise of rights guaranteed by Section 7 of the Act, thereby violating Section 8(b)(1)(A) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Union violated the Act, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, I recommend that the Union make Spangler, Hill, Fritz, and Anderson whole for any loss of compensation they may have suffered as a result of its failure to file work schedule change grievances on their behalf commencing in May 1992. Pay shall be computed as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[29] Finally, I recommend the Union be ordered to post an appropriate notice to members, copies of which are attached as an appendix [omitted from publication] for 60 days so that members and employees may be apprised of their rights under the Act and the Union's obligation to remedy its unfair labor practices.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, Oil, Chemical and Atomic Workers International Union Local 3-495, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing to file grievances because the grievants are not members of the Union.

(b) Communicating a policy to employees that the Union would give preferential treatment to union members.

(c) Establishing and maintaining a policy that nonunion members would not be equally represented by the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Benjamin Spangler, Michael Hill, Gerald Fritz, and James Anderson whole for any loss of compensation they may have suffered as a result of the Union's failure to file work schedule change grievances on their behalf commencing in May 1992.

(b) Post at its offices copies of the attached notice marked ''Appendix.''[31] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Union's authorized representative, shall be posted by the Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to ensure that the no-

[26] Doyle solicited union members to sign the grievances. Spangler testified Doyle solicited employees, Manual and Wright, and his testimony that the two were union members is undisputed.

[27] It is noted that Doyle allowed three individuals (R. J. Howard, W. E. Dunhee, and J. A. Ferguson) to write in their names on the grievances; however, all three were union members.

[28] I reject the Union's contention it owed no duty to Spangler, Hill, Fritz, and Anderson because they never asked, demanded, suggested, or even hinted that they expected Doyle to file grievances on their behalf. The four nonmembers in question are not required to engage in an act of futility in order to protect their rights. Doyle had made it clear nonmembers would not, as free riders, be allowed to sign the grievances. I also reject the Union's contention that the four employees in question had the wherewithal to remedy the effects of any failure on the part of the Union to file grievances on their behalf in that they, as individuals, could have simply filed grievances by and for themselves. Such actions on the part of the four employees in question, while permissible, would have been contrary to the established practice with respect to the work-hour grievances. President Thompson candidly admitted all grievances filed on the issues herein were filed by the Union.

[29] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 6621.

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

tices are not altered, defaced, or covered by any other material.

(c) Mail a copy of the notice to Benjamin Spangler, Michael Hill, Gerald Fritz, and James Anderson.

(d) Forward to the Regional Director for Region 11 signed copies of the notice sufficient in number for Hercules, Inc., if willing, to post at its Radford, Virginia facility.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Union has taken to comply.